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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General of the United States,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CENTER FOR DEMOCRACY AND TECHNOLOGY; COMIC BOOK LEGAL DEFENSE FUND; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; FREEDOM TO READ FOUNDATION; INTERNET ALLIANCE; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS; NEWSPAPER ASSOCIATION OF AMERICA; PUBLISHERS MARKETING ASSOCIATION; RECORDING INDUSTRY ASSOCIATION OF AMERICA; AND SOCIETY FOR PROFESSIONAL JOURNALISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF THE AMICI[1]

This brief *amici curiae* is submitted on behalf of a spectrum of media content providers, computer software and technology businesses, trade associations, and public interest organizations that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication suitable for both children and adults. *Amici* variously constitute and represent:

- writers, publishers, editors, and distributors of textual, audio, and audio-visual material ranging from books, magazines, newspapers, newsletters, and comic books to sound recordings;

- educators and librarians whose students and patrons desire access to the widest possible range of informative material;

- Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it;

- software developers and technology concerns who, responding to the market's demands, have been developing ever more effective means for parents to protect minors from exposure to age-inappropriate materials; and

1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* disclose that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained the written consents of the parties to the filing of this brief, and such consents are being lodged herewith.

- public interest organizations reflecting parental and community concerns that possibly well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.[2]

Amici are deeply concerned about Congress' latest attempt to censor what this Court has recognized to be a "dynamic, multifaceted category of communication" – the Internet – by transforming it into a child-proof medium whose "level of discourse" would be reduced to that "suitable for a sandbox." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it"). The First Amendment does not allow such sanitizing of public discourse, however well intentioned.

None of *amici's* constituents are engaged in the business of commercial pornography, yet *amici* appear here because they fear the speech with sexual content that they produce, distribute, use as teaching aids, and otherwise provide access to via the World Wide Web stands at risk of challenge under the Child Online Protection Act, Pub. L. No. 105-277, Div. C, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (codified at 47 U.S.C. § 231 (Supp. V. 1999)) ("COPA"). This fear is hardly idle, as COPA applies on its face to any Web site that, in the regular course of business, communicates *any* material that is harmful to minors – including written materials that do not constitute commercial pornography. 47 U.S.C. § 231(a)(1)-(3); 47 U.S.C. § 231(e)(2)(B). *See American Civil Liberties Union v. Reno*, 31 F. Supp. 2d

2. *Amici* are more fully described in the appendix.

473, 480 (E.D. Pa. 1999) ("*COPA I*") (COPA "imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that includes any material that is harmful to minors'"). Thus, the government's contention that "COPA's principal effect is to require commercial pornographers to place their pornographic teasers behind [adult verification] screens," Brief for the Petitioner ("Pet. Br.") at 25, finds no support in the law itself and affords no protection to *amici*'s constituents. As the district court observed, "[t]here is nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers only." *COPA I*, 31 F. Supp. 2d at 480.

It is far from inconceivable, for example, that a prosecutor could rely on COPA in attempting to suppress mainstream Web sites, such as the following:

- A publisher's Web site that makes available excerpts from a romance novel that contain graphic sexual content and photographs of male genitalia from a fine art photography book;
- An online bookstore's Web site that contains quotations from books in its catalogue, including from textbooks concerning human sexuality;
- An online library's Web site that allows users to "check out" and read books about human sexuality;
- A record company's Web site that includes clips of songs or videos containing sexually-explicit material;
- A Web site for fans of a musician or author that offers a message board or chat room where sexually-explicit messages have been posted;

- An online dictionary that includes definitions of various sexual practices;

- Search engines that provide hyperlinks to Web sites that include graphic sexual content; and

- A newspaper's Web site that provides hyperlinks to Web sites that include graphic sexual content.

COPA fails to remedy the constitutional flaws of the Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 103 ("*CDA*"), Congress' first effort to regulate speech on the Internet, which was struck down by this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997) ("*ACLU*"). The CDA criminalized speech over the Internet that was "patently offensive" or "indecent" for minors. In the ensuing legal challenge, first a three-judge panel of the Eastern District of Pennsylvania, and then this Court, reasoned that the burden imposed by the CDA on adult speech was unacceptable because, *inter alia*, the technological means proposed by the CDA for screening unsuitable materials from minors while, at the same time, not unduly burdening adult speech were, in combination, ineffective and unproven. (These proposed screening mechanisms were presented in the CDA as affirmative defenses.) At the same time, the Court found that a less restrictive means of accomplishing the statute's objectives – user-driven technology that gives parents greater ability to regulate their children's access to material they believe is inappropriate for them to receive over the Internet – would soon be widely available. *See ACLU*, 521 U.S. at 876-77.

Congress' attempt in COPA to remedy the CDA's fundamental defects is unavailing. Despite attempts to circumscribe the scope of the restriction, COPA still impermissibly burdens constitutionally protected speech because it is not narrowly tailored to advance a compelling government interest, as strict scrutiny requires. Specifically, despite the purported narrowing of its application to "commercial speech" on the World Wide Web and its revised "harmful to minors" test, COPA's attempted protection of minors still would deprive adults of speech that is constitutionally protected as to them, and COPA's affirmative defenses are insufficient to remedy the threat of criminal prosecution and sanctions for entities that offer constitutionally protected speech. For these reasons, among others, the district court entered a preliminary injunction against the enforcement of COPA following a five-day evidentiary hearing, *see COPA I*, 31 F. Supp. 2d at 473, which was upheld by the court of appeals on that ground that COPA imposed an impermissible burden on speech because it essentially would require every Web publisher to abide by the most restrictive "community standards." *See American Civil Liberties Union v. Reno*, 217 F. 3d 162, 165 (3d Cir. 2000) ("*COPA II*").

On May 13, 2002, this Court remanded the case for further consideration, noting that although COPA's use of "community standards" to define material that is harmful to minors did not *alone* render the statute unconstitutional, COPA could suffer from substantial overbreadth on other grounds. *See Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1722 (2002) ("*COPA III*"). On remand, the court of appeals again affirmed the district court's finding that COPA was substantially overbroad and not narrowly tailored. *See American Civil Liberties Union v. Ashcroft*, 323 F.3d 240 (3d Cir. 2003) ("*COPA IV*"). This Court should likewise find COPA to be substantially overbroad and not narrowly tailored and, hence, unconstitutional.

SUMMARY OF ARGUMENT

The Court should affirm the court of appeals' ruling that COPA violates the First Amendment on several grounds: (1) COPA is unconstitutionally overbroad, notwithstanding its limitation to harmful to minors material on the World Wide Web; (2) COPA's vague "commercial purposes" requirement would not cure its unconstitutional reach; (3) COPA's affirmative defenses would impose unconstitutional burdens on both speakers and listeners; and (4) there are alternative actions the government could take that would be less restrictive and more effective than COPA. For these reasons, COPA threatens constitutionally protected speech by mainstream content providers. Accordingly, *amici* urge this Court to affirm the judgment of the court of appeals.

ARGUMENT

I. THE CONSTITUTIONAL STANDARDS APPLIED IN *ACLU v. RENO* TO STRIKE DOWN THE CDA ARE EQUALLY APPLICABLE HERE, AND REQUIRE THAT COPA BE INVALIDATED AS WELL

It is undisputed that COPA, as a content-based regulation, is subject to strict scrutiny and therefore must constitute the least restrictive means of furthering a compelling governmental interest. *See COPA IV*, 322 F.3d at 252; Pet. Br. at 15. *Amici* acknowledge that the government has a compelling interest in protecting minors, and they share the government's concern with the psychological well-being of minors. But "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000). The government thus bears the burden of demonstrating that the regulations at issue are the least restrictive means of accomplishing the government's interest. *See Playboy*, 529 U.S. at 818. *Amici* submit that the government cannot meet this burden with respect to COPA principally because the content-based restrictions that COPA places upon speech on the World Wide Web effectively deprive adults of access to speech that is protected as to them.

A. The Constitutional Flaws This Court Found in the CDA Are Not Remedied by COPA

As explained below, the means by which Congress attempted to remedy the constitutional defects in the CDA that were identified by this Court in *ACLU* are cosmetic in nature and do not rectify the underlying infirmities that continue to pervade – and require the invalidation of – COPA on the ground that it is overbroad and will chill a substantial amount of constitutionally protected expression. *See Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). However appropriate the objective of shielding minors from sexually explicit material that is harmful as to them, COPA runs afoul of this Court's proscription against "ban[ning] speech fit for adults simply because it may fall into the hands of children." *Id.* at 252.

1. COPA's "commercial purposes" requirement unconstitutionally burdens a substantial amount of both commercial and noncommercial speech

Congress's attempt to limit COPA's scope to communications made "for commercial purposes," 47 U.S.C. § 231(a)(1), does not remedy the facial overbreadth of the statute. In drawing this distinction between commercial and noncommercial speech, COPA misapprehends the findings in the CDA litigation, which manifested concern over the censorious impact of federal "minors access" legislation on *all* manner of Internet speech, wherever originated, and whether profit-motivated or not. *See ACLU*, 521 U.S. at 877. Congress no more may regulate constitutionally protected speech flowing to, from, and through Web sites operated "for commercial purposes" than it can those operated for noncommercial purposes. Thus, Congress's narrowing of the statute to apply only to "communication[s] for commercial purposes" "by means of the World Wide Web" does not eliminate COPA's core constitutional infirmity: the fact that there is no practicable means by which the vast majority of those who provide content over the Internet (whether profit-motivated or not) can screen minors from accessing that content while not unduly burdening adults' access to their speech. *See COPA I*, 31 F. Supp. 2d at 495.

Moreover, the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. As this Court made clear in *Burstyn v. Wilson*, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by

the First Amendment." 343 U.S. 495, 501 (1952). *See also Smith v. People of the State of California*, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination [of speech] takes place under commercial auspices.").

It is by no means clear, in any case, that COPA "applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business," as the government asserts (Pet. Br. at 6), or even whether "for profit" would cover material made available for free. *See COPA III*, 122 S. Ct. at 1721 (Kennedy, J., concurring) ("the plain text of [COPA] does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result"). The district court found that, as of 1999, there were 3.5 million Web sites, of which approximately one-third were "commercial," *see COPA I*, 31 F. Supp. 2d at 486, and it found that plaintiffs employ a "variety of different business models" that involve generating revenues, which would render them "engaged in the business" under COPA's standards. *Id.* at 487. The court of appeals likewise held that COPA "would encompass both the commercial pornographer who profits from his or her online traffic, as well as the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the Web site." *COPA IV*, 322 F.3d at 256. Moreover, as noted, the statute encompasses writings, as well as images (*see* Pet. Br. at 34), thus expanding COPA's reach beyond commercial pornographic images.

As the foregoing suggests, the ambiguity as to the scope of COPA's "commercial purposes" renders it unacceptably vague.[3] What is the meaning of "regular" versus "principal," and how does the latter differ from the former? Is a covered entity one that regularly transmits communications that are harmful to minors, or simply one that regularly transmits communications over the Web? These uncertainties as to COPA's intended reach are reflected in the Department of Justice's pre-enactment appraisal of the "commercial purposes" requirement as one of the more "confusing or troubling ambiguities" in the statute. *See* October 5, 1998 Letter from Department of Justice Letter to Honorable

3. 47 U.S.C. § 231(e)(2) provides:

(A) Commercial purposes. A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business. The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

Thomas Bliley, Chairman of House Committee on Commerce ("DOJ Ltr.") at 3-4. The ambiguity of COPA's "commercial purposes" requirement exacerbates its very real potential to chill a substantial amount of constitutionally protected speech.

The government downplays this very real threat to speech, arguing that "Congress' authority to regulate effectively should not depend on a commercial pornographer's business model." Pet. Br. at 33. The government thus displays a profound disregard for the range of *nonpornographic* speech disseminated over the Web by, for example, mainstream book and magazine publishers that is vulnerable under COPA's ill-designed attempt to target commercial pornographers.

2. The revised definition of "harmful to minors" still will result in suppressing protected speech

In *ACLU*, this Court held that the CDA was unconstitutional because it had the impermissible effect of suppressing speech that adults have the constitutional right to receive and transmit to one another. *See ACLU*, 521 U.S. at 874. In this regard, the change from the CDA's "indecent/patently offensive" standard to COPA's "harmful to minors" standard is immaterial from a First Amendment standpoint. To the extent imposition of the "harmful to minors" standard on Web sites will, as with the CDA, have the effect of restricting the offer of, and adult access to, constitutionally protected speech, such regulation is unconstitutional. COPA will have just such an unconstitutional effect.

The "harmful to minors" standard, on its face, is neither clear nor limited as applied to the World Wide Web. For instance, the statutory language "as a whole" leaves ambiguous "whether what is to be judged as a whole is a single image on a Web

page, a whole Web page, or an entire multipage Web site, or an interlocking set of Web sites." *COPA III*, 535 U.S. at 593. The government's contention that an image or file on a Web site is analogous to a page in a magazine or book (Pet. Br. at 28-29) oversimplifies the nature of Internet communication. Whereas content and context in a magazine or book is static, Web content is dynamic and, in many cases, changes daily (if not hourly). The technology applied on the Web, such as hyperlinks and pop-up ads, further affects the juxtapositions of content perceived by Web users and, hence, potentially affects the meaning of "as a whole." *See COPA I*, 31 F. Supp. 2d at 481-84.

Furthermore, COPA's plain language leaves ambiguous the age(s) of minors to which the statute is directed. Prior to enactment of COPA, the Department of Justice itself queried whether material covered by COPA includes that which lacks serious value "for all minors, for some minors, or for the 'average' or 'reasonable' 16-year-old minor?" *See* DOJ Ltr. at 6. The government now argues that COPA should be read to implicitly include an "older minors" standard (Pet. Br. at 32), but the Court should decline the government's invitation to rewrite Congress' definition of "minor" to contradict the plain meaning of the statute. *COPA IV*, 322 F.3d at 254; *ACLU*, 521 U.S. at 884-85 (the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction").[4] Moreover, even if COPA were

4. The government relies heavily upon this Court's review of a Virginia state statute in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), for the proposition that a limiting construction of the term "minor" is appropriate. *See* Pet. Br. at 23-25. However, as this Court emphasized in that case, the Virginia Supreme Court's authority to impose a limiting statutory construction was based upon the authority of the Virginia Supreme Court to construe a state statute. *American Booksellers Ass'n*, 484 U.S. at 395.

rewritten as the government suggests, COPA still would result in an unconstitutional restriction of *adult* viewing of such material.

3. Limiting COPA to the World Wide Web does not eliminate the interference with the First Amendment rights of adults

No different from its change in the standard for covered speech, Congress' attempt to address the overbreadth problem this Court identified with respect to the CDA by "circumscribing" COPA so that it applies only to the World Wide Web, 47 U.S.C. § 231(a)(1), fails because many Web sites feature newsgroups, chat rooms, or other interactive features that are not susceptible to age screening. *See COPA I*, 31 F. Supp. 2d at 483 (noting existence of interactive Web-based chat rooms, e-mail, and newsgroups). As this Court noted in *ACLU*, "there is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." *ACLU*, 521 U.S. at 855 (citations omitted).

Even if it were technologically feasible to block minors from materials that are "harmful to minors," the Court found that there is no way to "block their access to that material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent." *ACLU*, 521 U.S. at 856 (citations omitted). *See also COPA I*, 31 F. Supp. 2d at 483. This problem exists regardless of whether the statute applies to the Internet as a whole or is limited to the World Wide Web. In either case, the regulations will chill protected speech in violation of the First Amendment. *See Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 967-68 (1984) ("[W]here the

defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.").

4. The affirmative defenses do not cure COPA's defects

The affirmative defenses provided by COPA are essentially identical to those contained in the CDA: a content-provider may attempt to restrict minors' access "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1). Although the government argues that COPA's affirmative defenses do not impose an "*unreasonable* burden" on adults (Pet. Br. at 35) (emphasis added), that assertion is at odds with this Court's prior holdings that requiring adults to self-identify and sacrifice their personal privacy to access constitutionally protected speech imposes an "undue burden." *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 746 (1996); *Playboy*, 529 U.S. at 924; *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 307 (1965); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 148 (1943).

Moreover, this Court held with respect to the CDA that the availability of affirmative defenses "do[es] not constitute the sort of 'narrow tailoring' that will save an otherwise

patently invalid unconstitutional provision." *ACLU*, 521 U.S. at 882. *See also American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999). In fact, this Court acknowledged the impracticability of such defenses for many commercial Web sites, particularly in view of the prevalence of Web sites that provide content free of charge:

> There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited. . . . Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

ACLU, 521 U.S. at 857 (citations omitted).[5]

Amici can attest (and the record before the district court affirms) that these realities have not changed. *See COPA I*, 31 F. Supp. 2d at 495 ("implementation of credit card or adult verification screens in front of material that is harmful

5. The district court found that credit card verification services imposed a start-up cost of approximately "$300, plus per transaction fees, for a service that does not automatically verify or authorize credit card numbers on the site to thousands of dollars in start-up costs, plus per transaction fees, to set up online credit card verification." *COPA I*, 31 F. Supp. at 488.

to minors may deter users from accessing such materials and [ ] the loss of users of such material may affect the speakers' economic ability to provide such communications"). Requiring credit card or age-verification screening for access to all potentially "harmful-to-minors" material on covered Web sites would severely burden expression, both of users and of content providers. First, would-be recipients of information will be deterred by pre-access screening requirements. The district court found that "consumers on the Web do not like the invasion of privacy from entering personal information" and that "COPA would have a negative effect on users because it will reduce anonymity to obtain the speech . . . resulting in a loss of traffic to Web sites." *COPA I*, 31 F. Supp. 2d at 487, 491. This is consistent with the experience of many *amici* and the Internet industry in general: many Web users will leave a site if required to register. *See id.* at 487 ("[I]n general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase.").

Responding to this concern, the commercial entities that comprise many of *amici's* constituents have in recent years enhanced and refined their models for doing business on the Web, and the model that is becoming prevalent is the advertiser-supported site that can be accessed by users free of charge. *COPA I*, 31 F. Supp. 2d at 486 ("[T]he most popular business model [on the Web] is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web."). While most sites devoted exclusively to "pornography" do require credit cards or adult verification, advertiser-supported sites are an important part of the array of options available for those seeking more diverse content.

Were advertiser-supported Web sites to employ the adult verification schemes required by COPA, they would likely alienate many users. By effectively forcing users of the Web to register with the sites they choose to access, implementation of the affirmative defenses will require individuals to disclose personal information (*e.g.*, name, address, social security number, credit card) to a third party prior to being afforded access to constitutionally protected speech. Reliance on such systems will create records of individuals' First Amendment activities – records that will be available for use and misuse regardless of statutory provisions seeking to protect them.

Conditioning adult access to constitutionally protected speech on the disclosure of one's identity raises troubling First Amendment and privacy issues. The defenses pose an untenable choice to individuals seeking access to information: protect privacy and forgo access to information, or exercise First Amendment freedoms and forgo privacy. *See American Civil Liberties Union v. Reno*, 929 F. Supp. at 847 ("adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password"). The government's argument that COPA's affirmative defenses pass constitutional muster because "there is no need to identify one's self in person" (Pet. Br. at 38) overlooks the very real threat to privacy that occurs when an individual must surrender credit card information, resulting in the production of a financial record that is linked to address, social security, and bank account information. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 23 ("When users are required to give personally identifying information to verify age, 'the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has

a plausible reason to be concerned that his name is associated with certain types of material.' ") (citation omitted).

As the Third Circuit concluded in striking down a law requiring adults to obtain access codes or other identification numbers in order to place a call to a telephone message service:

> [T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions. . . . [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.

Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785-86 (3d Cir. 1990) (citations omitted). *See also ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (analogous state statute violated the First and Fourteenth Amendments "because it prevents people from communicating and accessing information anonymously") (citations omitted), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).[6]

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6. *See also Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 754 ("[W]ritten notice requirement[s] will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."); *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 693 F. Supp. 332, 338 (E.D. Pa. 1988) (access codes impose a self-identification process, which carries with it "the societal opprobrium associated with dial-a-porn messages and the probable undesirability of having one's name and address at the disposal of message providers and other third parties"), *aff'd*, 896 F.2d 780 (3d Cir. 1990).

The burden is equally severe if viewed from the perspective of the operators of Web sites. As an initial matter, the affirmative defenses provide little comfort in that they do not immunize speakers from criminal prosecution under the Act; they only provide affirmative defenses – on which the speaker will bear the burden of proof – to be asserted following prosecution. As such, they are unlikely to curb the Act's severe chilling effect. As this Court reasoned in *Speiser v. Randall*, 357 U.S. 513 (1958), in holding unconstitutional an analogous procedure that placed an affirmative burden on the speaker of proving that its speech was "legitimate": "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . [which] can only result in a deterrence of speech which the Constitution makes free." *Speiser*, 357 U.S. at 526; *see also Free Speech Coalition*, 535 U.S. at 255 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."); *American Civil Liberties Union v. Reno*, 929 F. Supp. at 855-56; *COPA I*, 31 F. Supp. 2d at 497 (entering preliminary injunction based in part on COPA's "imposition of possibly excessive and serious criminal penalties" and placement of "the burden of establishing an affirmative defense [on the speaker]").

The government attempts to minimize the burden placed on protected speech by analogizing the Internet age verification services to checking driver's licenses at nightclubs, adult bookstores, and movie theaters. Pet. Br. at 36-37. But the financial and administrative burden imposed on a Web site operator to implement an additional software system and related applications is far greater than the simple task of requiring a staff person at a nightclub, bookstore, or

movie theater to adopt another task as part of his or her employment responsibilities. Similarly, the financial burden on a Web site visitor to register for an age verification service, and the inhibiting effect flowing from such registration, is far greater than simply presenting a government-issued driver's license that he or she already possesses.

Moreover, in suggesting that COPA's affirmative defenses should be upheld under the same principles as state harmful-to-minors display laws, the government ignores the fact that federal courts have held that numerous state Internet harmful-to-minors laws modeled on COPA constitute an undue burden on speech.[7] Furthermore, "this Court has yet to rule on the constitutionality of any of these [state display] statutes, which are in any event of little relevance to regulation of speech on the Internet," as Internet communication " 'requires a series of affirmative steps more deliberate and directed than merely' . . . scanning a magazine rack." *COPA III*, 122 S. Ct. at 1724 (Stevens, J., dissenting) (citation omitted); *see also ACLU*, 521 U.S. at 854.

Finally, Web sites, including many created and maintained by *amici*'s constituents, are increasingly employing interactive technology, which permits visitors to communicate with one another in discussion groups and chat

7. *See PSINet Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *see also Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001), *aff'd*, 238 F.3d 420 (6th Cir. 2000); *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd in part*, 342 F.3d 96 (2d Cir. 2003); *American Civil Liberties Union v. Napolitano*, No. CIV 00-0505TUC AM (D. Ariz. 2002) (unreported).

rooms, as well as by electronic mail. To the extent COPA applies to these Web fora, it causes additional burdens. While the employment of interactive technology greatly enhances the First Amendment value of the Internet by permitting listeners seamlessly to transform into speakers and speakers into listeners, implementation of one or more of the verification schemes envisioned by the government threatens to bring such technological strides to a halt.

For one, employment of verification schemes in interactive environments such as chat rooms will destroy the promise of such media of communication by fundamentally interfering with the spontaneity and flow of dialogue that occurs within them. Further, those who sponsor such fora on their Web sites (as do many of the entities represented by *amici*), when faced with the costly and difficult prospect of monitoring the speech occurring on them and the concomitant risk of prosecution under the Act for allowing ill-defined "harmful to minors" speech to transpire, necessarily will think twice about offering such fora. *See COPA I*, 31 F. Supp. 2d at 495 ("[T]here is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups . . . without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors."). These profound shortcomings of COPA's affirmative defenses leave *amici's* speech sponsors, who are representative of many other Internet speakers, with two equally untenable alternatives: (1) offer speech that is unquestionably constitutionally-protected as to adults but which may be construed as "harmful to minors," and thereby risk criminal prosecution and civil penalties under COPA;

or (2) suppress such speech by self-censorship, thereby denying adults access to constitutionally-protected material. Requiring *amici*'s constituents to face this dilemma is antithetical to fundamental First Amendment principles.

II. COPA FAILS STRICT SCRUTINY BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S OBJECTIVES

In addition to the foregoing, COPA also fails strict scrutiny because there are alternative actions the government could take to protect children that would be less restrictive and more effective than the measures provided for in COPA.

It is well established that the government has a compelling interest in protecting children from offensive material. *See*, *e.g.*, *ACLU*, 521 U.S. at 875. *Amici* share that interest, but "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id.* Here, a key issue is whether the government has chosen the *least restrictive means* to achieve its objective of protecting children from "harmful to minors" material online. As *amici* demonstrate below, COPA is neither effective nor the least restrictive means of promoting the government's interest in protecting children from inappropriate material online.

The purpose of COPA is to limit the access of minors to harmful material on the World Wide Web. *See* H.R. Rep. No. 105-775 at 5-6 (1998). However, COPA cannot achieve that goal effectively. First, COPA applies only to Web sites

originating in this country and thus does not even purport to prevent children from viewing material that originates overseas. As of 2002, an estimated 75 percent of the pornography available online – the kind of material COPA was designed to keep from children – originated overseas. NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET 72 (2002), *available at* http://books.nap.edu/html/ youth_internet/ ("NAS" Report"). COPA would have no effect on limiting minors' access to such material. Nor does COPA limit children's access to noncommercial Web sites containing adult material, or to non-Web Internet material, including thousands of newsgroups and chat communications, that contain material that might be deemed harmful to minors. These sources of information constitute a substantial portion of Internet content.

In addition to being ineffective, COPA's content controls are unnecessary in light of the many less restrictive alternatives available to protect children from harmful material online. The authoritative and comprehensive report entitled "Youth, Pornography, and the Internet," commissioned by an act of Congress and issued May 2002 by the National Academy of Sciences, provides an extensive analysis of methods of protecting children on the Internet from content deemed inappropriate. Also relevant is the October 2000 Final Report of the COPA Commission – created by the Child Online Protection Act itself – which arrived at many of the same conclusions later reached by the National Academy of Science study. COPA COMMISSION, FINAL REPORT OF THE COPA COMMISSION (2000) ("COPA Commission Report").

The NAS Report supports the District court's conclusion that there are a variety of less restrictive alternatives that would be more effective than COPA in furthering the governmental interest in protecting children from harmful-to-minors material on the Internet. In some cases, those alternatives involve voluntary efforts by parents to protect their children. In *Playboy*, this Court held that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id.* at 823. As the Court observed, "targeted blocking [initiated by parents] enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815.

This Court should not be deterred from finding that a less restrictive alternative exists merely because it may involve efforts of non-governmental actors. As the Court held in *Playboy*:

> [I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

529 U.S. at 824. *See also ACLU*, 521 U.S. at 877 (noting significance of "user based" alternatives to governmental action). It is the government's burden to show that such a plausible less restrictive alternative would not be effective, s*ee Playboy*, 529 U.S. at 816, and both the COPA Commission

Report and the NAS Report cast serious doubt on the government's ability to meet that burden. The COPA Commission analyzed the effectiveness and the speech restrictiveness of both user-side filtering and blocking technologies and the affirmative defenses set out in COPA. The results indicated that filtering and blocking technologies are *more* effective in protecting children, and less restrictive of First Amendment values, than the credit card and age verification systems identified in COPA. *See* COPA Commission Report at 8, 21, 25, 27.

Similarly, the NAS Report identifies a number of governmental actions that the committee concluded would be more effective than COPA in furthering the governmental interest in protecting children on the Internet, while at the same time being less burdensome on speech. The proposals advanced in the report are precisely the type of governmental actions that the Supreme Court found to be a less restrictive alternative in *Playboy*. As the report notes, "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." NAS Report at 8.[8] The following summarizes some, but not all, of the wide array of alternative public policy recommendations of the NAS committee:[9]

8. *Amici* take no position on the constitutionality of each of the possible governmental actions identified in the NAS Report. Some would be clearly constitutional, while the constitutionality of others would depend – as is common in this area of the law – on the details of drafting and implementation.

9. The COPA Commission also identified a wide range of governmental actions that it believed would substantially contribute to the protection of children on the Internet. Significantly, the passage and enforcement of laws like COPA was *not* included in the Commission's recommendations. Many of the Commission's recommendations are similar to those later made by the National Academy committee. *See* COPA Commission Report at 39-46.

- Concrete governmental efforts to promote Internet media literacy and educational strategies would yield superior results without any significant burden on protected speech. Specifically, the report suggests government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet education material, including public service announcements and Internet programming akin to that offered on PBS. NAS Report at 384-85.

- Government support for industry self-regulation would provide significant protection to children without imposing unconstitutional constraints on First Amendment freedoms. Financial or legal incentives, as well as government coordination and facilitation of private efforts to self-police, could prove effective in addressing the problem. *See id.* at 385. For instance, financial or legal incentives might be used to bolster ISPs' creation of child-safe portals. *See id.* Likewise, government incentives might encourage commercial sources of sexually explicit images to contractually require affiliates posting their content to put that content behind an Internet equivalent of "plain brown wrappers." *See id.* at 216.

- Government support of parents' voluntary efforts to employ technological solutions would provide an effective alternative to COPA. While recognizing that filtering technology is far from perfect, the NAS committee concluded that filters (which may be

installed directly on a computer by end-users or available as a feature offered by an ISP) can have "significant utility in denying access to content that may be regarded as inappropriate." *Id.* at 303.[10]

Amici believe that under the Supreme Court's analysis in the *Playboy* case, the district court's finding that less restrictive alternatives exist should be upheld. In addition to the lower court's conclusions, the NAS Report articulates a host of additional alternative governmental actions, all of which would qualify as less restrictive alternatives under *Playboy*. In light of these alternatives, COPA clearly fails strict scrutiny.

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10. *Amici* would *not* support government-mandated use of technological filtering tools for blocking content. While this Court has upheld mandated implementation of filters on a very narrow basis under limited circumstances in the Children's Internet Protection Act, *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003), *amici* oppose any further implementation of filters by government mandate.

CONCLUSION

Amici respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX: *THE AMICI*

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment. For AAP's members, the Internet creates a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content online. AAP's members are eager participants in this exciting new marketplace.

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. Founded more than seventy-five years ago to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people, ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

Appendix

The Center for Democracy and Technology (CDT) is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user-empowerment tools and technologies.

The Comic Book Legal Defense Fund (CBLDF) is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based, and online commerce in comics is steadily increasing. Past experience has shown that comics are particularly vulnerable to misapplication of "harmful to minors" standards as they are commonly perceived as an inherently juvenile art form. In reality, however, many comics are read by and geared to an adult audience. The CBLDF, therefore, fears that COPA would have a chilling effect on its many members who continue to explore and evolve the comic book art form.

Appendix

The Computer & Communications Industry Association (CCIA) is a nonprofit membership organization for companies and senior executives from diverse sectors of the computer and communications industry. CCIA was established nearly three decades ago to represent its members' vital interests, especially the need to promote competitive and fair open markets, open systems, and open networks. CCIA's member companies range from small start-ups to global leaders that operate in all aspects of the high-tech economy. They include information technology, telecommunications, networking equipment manufacturers, as well as software, Internet, telecommunications, and financial service providers, and others.

The Freedom to Read Foundation (FTRF) is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens. The FTRF and its library members serve both as access and content providers on the Internet. Many member libraries post a diverse array of content on their Web sites, as well as sponsor chat groups. In view of past attempts by some persons to ban literature and reference items from library collections, many of the FTRF's members fear prosecution under COPA should they post materials on the Internet that might be deemed "harmful to minors" in some community. The FTRF is thus concerned that the library patrons served by the FTRF's members will be denied access to constitutionally-protected materials.

Appendix

The Internet Alliance (IA) is a non-profit membership organization of companies for whom the Internet is central to their commercial enterprise. The IA operates exclusively in the 50 United States to promote consumer confidence and trust in the Internet, fostering its full potential as the premier marketing medium of the 21st century. Among the companies represented by IA are e-mail service providers, Internet service providers, marketers, and cable companies.

Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

The National Association of Recording Merchandisers (NARM) is a not-for-profit trade association founded in 1958 which serves the music retailing community in the areas of advocacy, networking, information, education, and promotion. The Association's more than 1,000 members include retailers, wholesalers, distributors, and suppliers of products and services, many of whom conduct business over the Internet. Some of NARM's members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

Appendix

Newspaper Association of America (NAA) represents the interests of more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for eighty-seven percent of the U.S. daily circulation. Many of these newspapers are currently on the Internet. A strong advocate of the press' First Amendment rights, NAA is particularly concerned with protecting the free flow of information over the Internet.

The Publishers Marketing Association (PMA) is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing which more mainstream publishers have not acquired. A number of PMA members have developed Web sites which offer book samples, chat rooms, and other fora for the discussion of their publications. The Internet is an essential tool for marketing and disseminating the unique voices represented by PMA's members and often is a significant source of their publishing income. The imposition of criminal sanctions for communications containing materials deemed "harmful to minors" is a real and tangible threat to these independent publishers, who provide a rich alternative to mainstream publishing houses. The PMA believes that the use of credit card and other user-identification systems defeats the purpose of this democratic medium by discouraging the informal perusal of works otherwise not accessible to the majority of Internet users.

Appendix

The Recording Industry Association of America (RIAA), a national trade association whose member companies produce, manufacture, and distribute more than ninety percent of the sound recordings sold in the United States, is committed to protecting its members' free expression rights across all communications media, including the Internet.

The Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press across all mediums, including the Internet.